

QUESTIONS PRESENTED

Whether a verdict against an agency or municipality can stand when the jury has exonerated the only official who by his conduct allegedly caused plaintiffs' constitutional harm and who had the final authority to establish agency policy with respect to the action ordered.

Whether the Court of Appeals for the First Circuit has misinterpreted local Puerto Rican Law and judicial decisions with respect to the question of whether and under what circumstances a public employee acquires a sufficient property interest in his job to invoke the protection of constitutional due process.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. The First Circuit's Decision As To Petitioners First Amendment-Political Discrimination Claim is not in conflict with the decision of this Court or of any Federal Circuit Court of Appeals.	4
II. The First Circuit's Decision Regarding Petitioners due process claim is not in con- flict with the decisions of this Court or of any Federal Circuit Court of Appeals.	9
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:		Pages
<i>Bishop v. Wood</i> , 426 U.S. 341 (1976)	10	
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	10	
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980)	12	
<i>City of San Louis v. Praprotnik</i> , 485 U.S. 112, (1988)	5	
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985)	10	
<i>Colón v. Mayor of Municipality of Ceiba</i> , 112 P.R.Dec. 740 (1982)	10	
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	12	
<i>Franco v. Municipality of Cidra</i> , 112 P.R.Dec. 260 (1982)	10	
<i>Kauffman v. P.R. Telephone Company</i> , 841 F.2d 1169 (1st Cir. 1988)	10	
<i>Los Angeles v. Heller</i> , 475 U.S. 796 (1986)	5	
<i>Monell v. New York City Department of Social Services</i> , 436 U.S. 658, 694 (1978)	4	
<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469 (1986)	5	
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	12	
<i>Santiago Negrón v. Castro Dávila</i> , 865 F.2d 431, (1st Cir. 1989)	12	
<i>Torres Ponce v. Jiménez</i> , 113 P.R.Dec. 58 (1982) .	12	
STATUTES:		
P.R. Laws Ann., tit. 5 §1201 (1981)	2	
P.R. Laws Ann., tit. 5 §1203 (1981)	2	
P.R. Laws Ann., tit. 3 §§1301-1431 (1978)	10	



IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-102

MARGARITA RIVERA DE FELICIANO, ZENAIDA VALENTIN,
EVELYN MIRANDA, ORLANDO ORTIZ ROURA, JOSE VALLINES
and MODESTO MELENDEZ MANGUAL,

Petitioners,

v.

FARM CREDIT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari filed by Petitioners, seeking review of the First Circuit's judgment in this case.

STATEMENT OF THE CASE

On August 2, 1988, based on the verdict rendered by the jury in this case on July 20, 1988, the District Court for the District of Puerto Rico entered judgment and ordered Farm Credit Corporation, (hereinafter FCC) to reinstate plaintiffs to the positions

they formerly held in FCC, awarded them back-pay and ordered FCC to pay compensatory damages in the amounts determined by the jury.

Respondent FCC is "a body corporate and politic constituting a public corporation and governmental instrumentality", created by the "members of the Council of Secretaries of the Commonwealth of Puerto Rico", P.R. Laws Ann. tit. 5, § 1201 (1981), that is "attached to and [forms] a part of the Department of Agriculture of Puerto Rico." P.R. Laws Ann. tit. 5, § 1203.

Petitioners, Margarita Rivera de Feliciano, Orlando Ortiz Roura, Evelyn Miranda, Zenaida Valentín, Modesto Meléndez and José L. Vallines, are employees of FCC who hold diverse career positions ranging from First Vice-President in Charge of Farm Credit to Administrative Secretary II. On August 16, 1985, they filed suit against FCC, its President, Francisco de Jesús, and the then Secretary of Agriculture, Antonio González Chapel. The two individual defendants were sued in their personal and official capacities.

Plaintiffs claimed that they had been fired from their respective positions because of their ideological beliefs and affiliation to the opposition is New Progressive Party, in violation of their rights protected by the First Amendment to the U.S. Constitution. They also claimed that they had been deprived of property rights, afforded and secured to them under the Personnel Regulations for Managerial Employees of the FCC, without due process of law.

The onus of plaintiffs' complaint, and indeed the whole focus of their evidence, was exclusively directed against defendant Francisco de Jesús. At no point in

this 42 U.S.C. § 1983 action, either in the complaint, the pre-trial order, or during the trial, did plaintiffs allege (and much less prove) that FCC, as a local governing body, could be sued directly under § 1983, because "the action that is alleged to be unconstitutional implements or executes a policy . . ., promulgated by that body's officers . . . (or was taken) pursuant to governmental custom. . ." *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

In due course, and after answering the complaint, on July 13, 1987, FCC moved for dismissal on the basis of the Eleventh Amendment immunity that protects the Commonwealth of Puerto Rico, its departments and instrumentalities. Four days later, the district court denied FCC's motion.¹ After further pre-trial proceedings that are not relevant to this Petition, a jury trial was held from July 11 to July 20, 1988. On the fifth (5th) day of trial, defendant Antonio González Chapel's motion for directed verdict was granted by the court below. Subsequently, on July 20, 1988, the jury rendered its verdict and found FCC's President, defendant Francisco de Jesús, not liable. Pursuant to such verdict, the lower court dismissed the complaint against Mr. de Jesús. For these reasons, the only two individual defendants whose conduct could be affirmatively linked to FCC were exonerated of the commission of any of the constitutional torts alleged by plaintiffs. Nevertheless, and in spite of the fact that the conduct of the only two

¹ The Eleventh Amendment issue was raised on appeal by FCC. Since the First Circuit reversed the judgment against FCC on other grounds, however, there was no need to reach that issue. See Petition's Appendix at page 2a.

persons with final authority to determine the policy of FCC was found not to constitute a constitutional violation, the jury verdict against FCC was sustained by the lower court, judgment was entered against FCC, and an injunction was issued on the basis of such verdict ordering the reinstatement of plaintiffs with back-pay. See Petition's Appendix at pages 23a and 29a.

On July 26, 1988, FCC, the only remaining defendant in this case, filed its notice of appeal. The Court of Appeals for the First Circuit reversed. The Court held that the verdict against the FCC in the political discrimination claim could not stand due to the jury's verdict in favor of De Jesús and that Petitioners had failed to show a sufficient "property" interest in their jobs to invoke the protection of the due process clause.

REASONS FOR DENYING THE WRIT

I. The First Circuit's Decision As To Petitioners' First Amendment-Political Discrimination Claim is not in conflict with the decision of this Court or of any of the Federal Circuit Court of Appeals' decisions.

Petitioners' principal argument is that a jury verdict against the FCC can stand, interpreted as a finding of unconstitutional policy on the part of FCC, even in the face of a jury verdict exonerating the only other defendant, De Jesús, President of FCC, who fired plaintiffs and who was the only official in the agency with final authority to establish policy with regard to the hiring and firing of employees. Petitioner's argument is simply wrong. In light of this Court's decisions in *Monell v. New York City Department of Social Services* 436 US 658, 694 (1978);

Los Angeles v. Heller, 475 US 796 (1986); *Pembaur v. Cincinnati*, 475 US 469 (1986) and *City of San Louis v. Praprotnik* 485 U.S. 112 (1988), the decision of the First Circuit precluding a finding of liability against FCC when its principal officer and the person who allegedly acted in an unconstitutional manner was exonerated by the jury, seems to be required.² Indeed, apart from very confusing and general allegations of conflict, Petitioners fail to indicate the nature and extent of any conflict between the First Circuit decision and this Court's precedents. Petitioners also fail to point out any specific conflict between the decision of the First Circuit Court of Appeals and any other circuit. Contrary to petitioners' unfounded allegations, a reading of the opinion of the Court of Appeals for the First Circuit clearly demonstrates that it is consistent with Supreme Court doctrine and merely represents a careful and considered application of that doctrine to the very particular set of facts and circumstances of this case.

Two basic principles, established by this Court, interact in this case to preclude the jury's finding of liability against FCC. First, in order to establish liability for a government agency or municipality, the plaintiff must establish that a constitutional deprivation has taken place and that such deprivation is the result of a policy or custom of the agency. See

² Petitioners' assertion that the issue of inconsistent verdicts was "never raised on appeal nor briefed" nor discussed at oral argument is totally misleading. A whole section of Respondents' Brief in the Court of Appeals was devoted to that issue. See Petition's Appendix at pages 17a-18a. The fact that the issue was not extensively discussed at oral argument is, of course, irrelevant.

Monell v. New York City Department of Social Services, 436 US 658, 694 (1978). In *Los Angeles v. Heller*, this court held that if a jury has concluded that the plaintiff has suffered no constitutional deprivation or harm, the agency or municipality may not be held liable because of the existence of an unconstitutional policy which may have authorized the infliction of the unconstitutional harm. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations may have *authorized* the use of constitutionally excessive force is quite beside the point." *Los Angeles v. Heller*, 475 US at 799.

Second, the Court has held that in order for an agency or municipality to be held liable for an isolated or single act of an officer, the decision to take the action involved must have been taken by the official or officials who have the final authority to establish policy with regard to that particular activity. In *Pembaur v. City of Cincinnati*, 475 U.S. at 481, this Court stated that before a municipality or an agency can be held liable it must be established that the "decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." This Court held categorically that municipal or agency "liability under 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.*, 475 U.S. at 483-484.

These two clearly established principles preclude the finding of liability against FCC, because De Jesús, the President of FCC, was both (1) the officer who

acted against the plaintiffs by dismissing them and (2) the officer with final authority to establish agency policy regarding employment practices or to take the decision to follow a specific course of action regarding employment matters. As the Court of Appeals for the First Circuit concluded, see Petition's Appendix, at page 6a.

[t]o establish an agency's liability the plaintiffs must show that the discriminatory acts were done by persons with 'final authority to establish [the agency's] policy with respect to the action ordered, . . . In this case, the *only* person plaintiff claimed to have such authority was De Jesús. The record contains no evidence that any other FCC officials . . . had final policy making authority. . . Thus the only legally adequate basis for the FCC's liability was eliminated by the jury's verdict in favor of De Jesús.³

Petitioners emphasize throughout the Petition that, in this case, the jury made a determination that an unconstitutional policy of political discrimination existed at FCC and that such policy was the cause of

³ The Court of Appeals considered that there might be circumstances in political discrimination cases where "jury verdicts of this sort could prove consistent" because there "might well be a basis for an agency's liability other than the conduct of the exonerated defendants", or because a jury's verdict might reflect the belief than an employee "while acting pursuant to the agency's unlawful policy nonetheless acted in good faith" and was entitled to qualified immunity. Petition's Appendix at page 5a. In this case, the issue of De Jesús' qualified immunity was decided by the District Court in plaintiffs favor and was not submitted to the jury. Petition's Appendix at page 6a.

petitioners' alleged deprivation of their constitutional rights. See Petition at pages 6, 7, 8, 9, 10, 11 and 12. (For example at page 7, Petitioners stated "The jury determined that it was FCC policy what caused the constitutional harm"). Petitioners' assertion that the jury made a determination of the existence of an unconstitutional FCC policy, independent of the actions attributed to De Jesús, is simply false.

From the beginning to the end of this case at the trial level, De Jesús' actions and FCC's policy have been inextricably intertwined in petitioners' theory of the case. Neither in their complaint nor in the statement of plaintiffs theory contained in the Pretrial Order, did petitioners allege the existence of a policy of FCC, which execution caused the alleged violations of their First Amendment rights, independently of De Jesús' actions. Similarly, petitioners did not request such an instruction from the District Judge to the jury. The unobjection instructions to, the jury clearly rested FCC's liability on De Jesús liability. As the First Circuit noted "nothing in the instruction even hints that the jury could find the FCC liable without finding De Jesús liable." Petitioners' Appendix at page 8a. Thus, Petitioners' statement that the jury found the existence of an unconstitutional policy at FCC bears no resemblance to reality.

Moreover, the failure of the District Court to send the jury back to reconsider the inconsistent verdict can be attributed to Petitioners' trial strategy. After the jury returned its verdict, petitioners "wishing to preserve their favorable verdict against the FCC, simply argue that the court should accept the verdict", and did not seek the resubmission of the case to the jury. Petitioners' Appendix at page 9a. Further,

petitioners did not appeal the judgment in favor of De Jesús. As the Court of Appeals stated "under these circumstances it seems procedurally fair to decide the case according to the ground rules that counsel have set: if the verdicts are consistent, the plaintiffs win; if they are inconsistent, the FCC wins". Petitioner's Appendix at 9a.

Thus, the inconsistency of the verdict and/or the illegality of the jury finding of liability of FCC at the same time that it exonerated its president De Jesús, is due, not only to the correct application of the appropriate legal principles as discussed above, but also to petitioner's legal strategy at the District Court level. Through the whole course of those proceedings Petitioners emphasized the relationship of De Jesús and FCC liabilities. Only when the jury returned its verdict, the Petitioners, all of the sudden, discovered the existence of an FCC policy independent of the actions and decisions of De Jesús.

In sum, the First Circuit opinion is nothing more than the correct application of the relevant legal principles to a very particular and specific set of facts and circumstances. Petitioners have failed to point out a specific conflict with any of this court's precedents or with any decision of other Court of Appeals. There is no conflict and no justification for this Court's intervention.

II. The First Circuit's decision regarding petitioners due process claim is not in conflict with the decisions of this Court or any Federal Circuit Court of Appeals

It is well-established that in order to succeed on a claim of deprivation of property without due process,

a public employee must prove that he has a property interest in continued employment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972); *Bishop v. Wood*, 426 U.S. 341 (1976). If the public employee demonstrates that he has a property interest in continuing employment, then he must be afforded a hearing for his discharge to comply with the requirements of due process of law. See *Cleveland Board of Education v. Loudermill* 470 U.S. 532 (1985). The determination whether a public employee has a property interest in continuing employment must be "decided by reference to state law". *Bishop v. Wood*, 426 U.S. at 344.

The doctrine in the First Circuit is quite clear that, under Puerto Rican Law public employees hired for career positions in violation of agency regulations enacted under the Puerto Rico Personnel Act, P.R. Law Ann. tit. 3, §1301-1431 (1978), cannot claim any property interest in continued employment; the career appointments are simply null and void *ab initio*. *Kauffman v. P.R. Telephone Company*, 841 F.2d 1169, 1173 (1st. Cir. 1988); *Santiago Negrón v. Castro Dávila* 865 F.2d 431, 436 (1st. Cir. 1989). In *Kauffman* the First Circuit cited with approval the cases decided by the Supreme Court of Puerto Rico in *Torres Ponce v. Jiménez* 113 P.R.D. 58 (1982); *Colón v. Mayor of Municipality of Ceiba*, 112 P.R.Dec. 740 (1982); *Franco v. Municipality of Cidra*, 112 P.R.Dec. 260 (1982). In the present case, the First Circuit found that the record contained "uncontradicted evidence" that plaintiffs' appointments were "unlawful and void as a matter of commonwealth law" and that, there-

fore, the "jury could not lawfully find to the contrary". Petition's Appendix, at page 14a.⁴

No matter how Petitioners try to characterize the due process issue presented for review, the fact is that they are asking this Court to reverse the First Circuit on an interpretation of Puerto Rican Law. As the First Circuit of Appeals put it, Petition's Appendix at page 15a, the question in the due process claim:

[h]as to do with whether or not Puerto Rico Law gave the plaintiff a sufficient 'property' interest in their jobs as to invoke the protection of the Fourteenth Amendment. We can find no significant difference between *Kauffman* and this case [so] we must reach the same conclusion. *Plaintiffs did not show sufficient property interest in their jobs*; hence their jobs did not fall within the scope of the Fourteenth Amendment protection of property rights.

⁴ Again, without any basis in fact, Petitioners assert that "the jury found that plaintiffs' appointments were made in compliance with FCC regulations". Petition at page 15. The jury found no such thing. The special verdict directed the jury only to find whether Petitioners were "career" employees pursuant to a district Court's instruction that a career employee was "somebody who *appears* to be a career employee". See Petition's Appendix at pages 13a and 29a. The Court of Appeals found that these instructions "may have suggested to the jury that, as a matter of law, they had to find that the plaintiffs were career employees". *Id* at 13a. Thus, the fact is that under the District Court's instructions the jury did not need to make a finding of compliance with FCC's personnel regulations or the Commonwealth's personnel laws because a career employee was anybody "who *appears*" to be one.

Petitioners also clearly misunderstand the difference between a First Amendment claim for political discrimination and a due process claim. See Petition at pages 15-16, 19-20. The existence of a property interest is only relevant to the due process claim. A mere reading of the Opinion of the First Circuit clearly indicates that the interpretation of Puerto Rican Law, for purposes of determining whether Petitioners have a property interest under Puerto Rican Law, is an inquiry pertinent only to Petitioners' due process claim. Similarly, the claim of political discrimination is entirely independent of and separate of the due process claim. Even if it were true, which it isn't, that Petitioners had prevailed in their political discrimination claim the determination of whether they had a property interest under Puerto Rican law would not be affected one way or the other. That is the clear lesson of *Perry v. Sinderman*, 408 U.S. 593 (1972) and its progeny. See also *Elrod v. Burns* 427 U.S. 347 (1976); *Branti v. Finkel* 445 U.S. 507 (1980).

In the same vein, Petitioners attempt to picture the case of *Santiago Negrón v. Castro Dávila* 865 F.2d 431 (1st. Cir. 1989) as in conflict with *Kauffman* and the First Circuit Opinion in the instant case, reflects the same misconception. In *Santiago Negrón v. Castro Dávila*, the Court rejected the theory that the lack of a property interest, because of the plaintiffs' illegal appointment, precluded their First Amendment claims. *Kauffman* and its progeny, therefore, stand "only for the proposition that if a government employee is hired in violation of the Personnel Act of Puerto Rico, he or she has no property interest in the position and, hence, no due process right to a hearing before discharge", 865 F.2d at 436.

Thus, the First Circuit's decision is merely a ratification of settled First Circuit precedent regarding an interpretation of local Puerto Rican Law and judicial pronouncements regarding the question of when a public employee acquires a property interest in his job. As this is a matter purely of local Puerto Rican Law, it is impossible to argue that a conflict exists between the First Circuit's decision and any decision of this Court. Petitioners have also failed, naturally, to point out any specific conflict with decisions of other Courts of Appeals. There is no reason or justification for this Court's intervention in the present case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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